World SS, Inc. *and* Teamsters, Local 43 *and* Christine L. Holloway. Cases 30–CA–13549 and 30–CA–13622

September 20, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 21, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, and the Respondent filed a reply brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

For the reasons set forth in the judge's decision, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by informing employee Christine Holloway that it had transferred employees from another facility in order to defeat the Union in a Board election and that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Holloway because of her union activities. The judge further concluded that the Respondent did not violate Section 8(a)(1) and (3) by discharging employees John Catalanello and Floyd Matthews for conduct that occurred while they were on unlawful suspension. For the reasons stated below, we find merit in the General Counsel's exceptions to the judge's dismissal of the 8(a)(3) and (1) allegations regarding Catalanello's and Matthews' discharges.[4]

SuperValu, Inc. operates a food distribution service in Pleasant Prairie, Wisconsin, where truckdrivers deliver products provided by outside vendors. Before August 1996,[5] the truckdrivers hired and paid independent contractors called "lumpers" to unload their trucks at SuperValu's facility. In late August or early September, the Respondent entered into an agreement with SuperValu to provide lumping services at this distribution center. SuperValu, which was seeking to eliminate the need for independent contractors by creating an exclusive lumping company, informed the current lumpers that they would have to work for the Respondent if they wanted to continue unloading trucks at the site. However, for the relevant period here, SuperValu permitted truckdrivers to hire their own lumpers as they had done before.

Both Catalanello and Matthews were experienced lumpers who had worked for 2-1/2 and 5 years, respectively, as independent contractors at the SuperValu facility. About September 22, the Respondent hired Catalanello and Matthews to work as lumpers there. The new employees immediately became dissatisfied with their working conditions because the Respondent paid them about half of what they had earned as independent contractors and they received no overtime pay. After only 1 day on the job, Catalanello, Matthews, and three other new employees went to the Union and signed authorization cards.

On October 7, a union official went to the Pleasant Prairie site and presented Supervisor Harding with the signed union cards, including those of Catalanello and Matthews. Harding informed higher management of the organizing activity. The next morning, October 8, the Respondent's branch manager, Jeffrey Jones, commented to Catalanello and Matthews: "What's the matter with you guys? [W]e give you everything. Why aren't you happy? [W]hat do you want the Union for?" Catalanello replied that he was worried about job security.

After work on October 8, Harding joined Catalanello and Matthews for breakfast. Harding asked them, "So you guys want to turn Union, huh?" The two employees replied that they did. Harding later informed them that "this Company will never turn Union." He explained that the Respondent, as a nonunion employer, had the capacity to operate the entire warehouse if SuperValu's unionized employees ever went on strike. After Mat-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were filed to the following findings by the judge: (1) Dock Supervisor Arthur Harding is a statutory supervisor; (2) the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees, by warning employees that they could "leave" if they were unhappy on the job, by implying to employees that it would be futile for them to organize the Respondent, and by suspending employees John Catalanello and Floyd Matthews; and (3) the Respondent, by Harding, did not unlawfully interrogate Matthews by questioning him about wanting to go union, and the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by suspending Catalanello and Matthews.

[3] We shall modify the recommended Order and notice to reflect more clearly the judge's findings of violations, and to reflect our reversal of the judge's dismissal of two unlawful discharge allegations, and to reflect our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[4] We find it unnecessary to decide, however, whether the discharges independently violated Sec. 8(a)(1) of the Act since the remedy would not differ materially.

[5] All dates are in 1996, unless otherwise noted.

thews complained, Harding responded, "If you don't like it you can leave."

On October 10, Branch Manager Jones handed Catalanello a piece of paper with a name and phone number on it and said that a man named Tim Athey wanted to speak with Catalanello. After Catalanello arrived home, he called the phone number and left a message on an answering machine. Athey returned Catalanello's phone call later that day. Athey, who identified himself as a part owner of the Respondent, asked about Catalanello's organizing activities and then informed him that it would not be in Catalanello's best interest to continue the organizing effort.

About October 24, Harding directed Catalanello to unload a truck near quitting time. Catalanello asked Matthews to help him as they had driven to work together. Because their shift was almost over and the SuperValu forklift drivers were about to begin their lunchbreak, Matthews was not eager to start unloading another truck. Matthews, who had previously told Harding that he did not intend to stay late that morning, knew that the work would last well beyond the end of his and Catalanello's workday and that they would not receive any overtime pay for performing it.

Although SuperValu usually does not permit lumpers to stay on the dock and work during its employees' lunch hour, Harding had persuaded a SuperValu supervisor to have a forklift driver pull the grocery pallets off the truck before lunch and to allow the lumpers to unload the pallets during lunchbreak. When the forklift driver did not pull the pallets, Harding complained loudly about it and demanded to know the name of the driver. The forklift driver heard Harding's remarks, dropped the pallet he was working on, and began unloading a different truck. It was now past the end of Catalanello's and Matthews' shift. They knew it would take at least 4 more hours to unload the truck. The employees, who were upset with Harding's handling of the situation, told him that they were going home. Harding replied, "Fine, whatever."

On Catalanello's and Matthews' return to work that night, Jones told them that he had received a phone call from his boss complaining about a truck they had failed to unload and stating that the Respondent would have to hold someone accountable. The employees explained that they had told Harding several times that they were leaving because their shift had ended. Catalanello and Matthews were off work the following day. Two days later, when they returned to the SuperValu warehouse to pick up their paychecks, Jones suspended them for 3 days for walking off an uncompleted job without permission. Matthews angrily accused Harding, who was present, of lying to Jones to conceal his own mistakes. Both employees refused to sign their suspension notices, and walked out of the room together.

On the first day of the employees' suspension, about October 27, Catalanello received a phone call from a truckdriver en route to the SuperValu warehouse who needed help unloading the truck. The truckdriver apparently did not know that the Respondent was now performing most of these services for SuperValu. After Catalanello agreed to unload the truck and arranged for Matthews to help him, they met the driver at the SuperValu guard shack and rode into the facility with him. They began unloading the truck before Jones approached them and asked if they were working as independent contractors. When Catalanello and Matthews replied that they were, Jones told them that they were competing directly with the Respondent for lumping work and terminated their employment. He asked for their badges - Matthews was wearing his—which the lumpers refused to return until they received their final paychecks. After the Respondent discharged them, Catalanello and Matthews continued to unload trucks as independent contractors until November 8, when the Respondent gained exclusive lumping privileges at the SuperValu warehouse.

The judge found, and the Respondent has not excepted to his finding, that the Respondent violated Section 8(a)(1) by suspending Catalanello and Matthews for 3 days because of their protected concerted activities.[6] He concluded that:

> [T]he evidence supports a reasonable inference that the decision to leave work at the end of their 8-hour shift was a logical outgrowth of a concern expressed by Matthews and shared by Catalanello about the Respondent's failure to pay lumpers an overtime rate for work performed beyond 8 hours a day. The fact that they were suspended at the same time for the same reason, and the fact that they walked out of the suspension meeting together after refusing to sign their suspension notices, also supports the inference that they were engaged in protected concerted activity. [Citation omitted.][7]

The amended consolidated complaint further alleged that the Respondent violated Section 8(a)(1) of the Act by discharging Catalanello and Matthews because of their protected concerted activities. While noting that Catalanello and Matthews had engaged in such activities the previous day when they complained about the Respondent's pay practices and left work, the judge found that the two men were working as independent contrac-

[6] The General Counsel has not excepted to the judge's failure to find 8(a)(3) violations in these suspensions.

[7] JD, sec. III,A,6,a, par. 3.

tors, not employees, when they performed lumping services while on suspension. Because he found that these individuals had lost their employee status while working as independent contractors and thus had no ability to engage in protected concerted activities under the Act at the time of their discharges, the judge concluded that the Respondent did not violate Section 8(a)(1) of the Act by terminating Catalanello and Matthews.[8]

Regarding the additional issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Catalanello and Matthews for their union activities,[9] the judge found that the employees' union activity, the Respondent's knowledge of it, its animus towards the Union, and the timing of the discharges "tends to support a reasonable inference that the protected union activity was a motivating factor in the decisions to discharge."[10] Nonetheless, the judge concluded, citing *Crystal Linen Service,* 274 NLRB 946, 948–949 (1985); and *Associated Advertising Specialists,* 232 NLRB 50, 54 (1977), that the Respondent sustained its burden to show that Catalanello and Matthews would have been discharged in any event for performing lumping services as independent contractors, since the Respondent would have sought this work if given the opportunity. The judge therefore found that the Respondent did not discharge these employees in violation of Section 8(a)(3) and (1) of the Act.

For the reasons stated below, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by discharging Catalanello and Matthews because of their union activities.

In *Wright Line*,[11] the Board set forth a test of causation for all cases alleging violations of Section 8(a)(3) and (1) turning on employer motivation. Under the *Wright Line* test, to establish that an employer unlawfully discharged an alleged discriminatee, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the employer's decision to discharge.[12] Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.[13]

We agree with the judge that the General Counsel satisfied his evidentiary burden of establishing that Catalanello's and Matthews' union activities were a motivating factor in their discharges. The evidence shows that Catalanello and Matthews were among the employees who initiated contact with the Union and who immediately signed authorization cards. It is also clear that the Respondent was aware of their activities because the Union showed the Respondent cards signed by Catalanello and Matthews on October 7. On learning of the employees' union activities, the Respondent's response was swift. As detailed infra, the next day, Branch Manager Jones coercively interrogated these employees; Supervisor Harding informed them that it would be futile to organize a union of the Respondent's employees; and Harding told Matthews, in Catalanello's presence, that he should quit if he was unhappy working for the Respondent. The Respondent's executive vice president, Athey, also coercively interrogated Catalanello by phone on October 10, and advised Catalanello that it would not be in his best interest to continue the organizing effort. Additionally, we have adopted the judge's findings that the Respondent unlawfully told employee Holloway that it had transferred employees from another facility in order to defeat the organizing campaign and later violated Section 8(a)(3) of the Act by discharging her, giving a pretextual reason. Finally, the Respondent does not except to the finding that it unlawfully suspended Catalanello and Matthews only the day before. Thus, the evidence is overwhelming that the Respondent had animus towards its employees' union activities. The timing of events supports a finding that the discharges violated Section 8(a)(3) because they occurred roughly 2 weeks after the Respondent learned of the union activity and only 1 day

[8] Under Sec. 2(3) of the Act:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or *any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined. [Emphasis added.]

[9] The judge noted that the amended consolidated complaint did not allege this violation, but he considered it on the merits because the General Counsel had argued in his posttrial brief that the discharges also violated Sec. 8(a)(3). In its exceptions, the Respondent does not argue that the judge erred in considering this issue. The underlying charge itself alleged that the discharges violated Sec. 8(a)(3). Based on the record evidence, we find that the matter of whether the discharges violated Sec. 8(a)(3) was fully litigated at the hearing. Thus, we conclude that the judge properly considered the 8(a)(3) allegations that the General Counsel raised in his posttrial brief. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[10] See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] Id.

[12] Id.

[13] Id.

after the Respondent unlawfully suspended these employees for engaging in protected concerted activity.[14] For these reasons, we find, as did the judge, that the General Counsel has established under *Wright Line* that Catalanello's and Matthews' union activities were a motivating factor in their discharges.

Because the General Counsel has satisfied his initial evidentiary requirements, the burden shifts to the Respondent to establish that it would have discharged these two employees even in the absence of their union activities. We disagree with the judge that the Respondent has met that burden.

We reject the judge's finding that the Respondent would have discharged Catalanello and Matthews in any event because of their purported disloyalty in performing unloading work for one of the truckers. Although the Respondent claims that it discharged Catalanello and Matthews for performing lumping work that the Respondent could have done, the Respondent submitted no evidence establishing that the Respondent would have performed this work for the trucker if the suspended employees had declined to assist him. At this time truckers could use whomever they wanted to unload their trucks. As far as the record shows, the Respondent's only opportunity to perform all unloading work was to obtain an exclusive concession covering the work from SuperValu. There is certainly nothing to suggest that Catalanello and Matthews, by working for the trucker on this occasion, would interfere in any way with the Respondent's efforts to obtain that exclusive concession. In fact, shortly after their discharges the Respondent was able to secure the exclusive concession. Thus, we reject the judge's finding that the Respondent lawfully discharged Catalanello and Matthews because they were acting as its business competitors; they could not reasonably have been viewed as such based on the single incident involved here. Rather, the weight of the evidence establishes that the Respondent seized on the employees' performance of lumping work as a pretext for discharging them. In the absence of any other proffered reason for their discharge, the Respondent has failed to rebut the General Counsel's initial showing that the discharges were unlawful, and we conclude that the Respondent discharged Catalanello and Matthews in violation of Section 8(a)(3).

[14] *NLRB v. Rain Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984) (timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision); see *Standard Sheet Metal, Inc.,* 326 NLRB 411, 421 (1998) (employee unlawfully suspended 1 day after having a verbal disagreement with his foreman regarding the union); *Trader Horn of New Jersey, Inc*., 316 NLRB 194, 199 (1995) (three employees unlawfully discharged on the same day the employer identified them as being involved with the union).

The cases that the judge relies on for dismissing the 8(a)(3) allegation are inapposite here. In *Crystal Linen Service,* supra, the Board found no 8(a)(1) violation where the employer discharged striking employees after sending them a letter warning them that they were acting disloyally by soliciting their former customers to switch permanently to a competitor that had employed them during the strike. The Board held in *Associated Advertising Specialists,* supra, that the employer lawfully discharged a laid-off employee who had formed a competing enterprise and attempted to permanently solicit business from the employer's principal customer, apparently using information received during the course of his employment, resulting in the employer losing that customer to a third party. In contrast, there is no record evidence establishing that Catalanello's and Matthews' actions took any business from the Respondent or interfered with the Respondent's effort to obtain future business.

In any event, it was the Respondent that temporarily caused these employees to lose their livelihood by unlawfully suspending them for 3 days. Catalanello and Matthews, as discriminatees, had the obligation to mitigate their loss of earnings during the backpay period. Both employees did this the best way they knew how by working as lumpers at the SuperValu site. Their predicament was analogous to that faced by the discriminatees in *Marshall Maintenance Corp*., 149 NLRB 735 (1964), in which the employer sought to deny the discriminatees reinstatement because they had attempted to form a competitive business following their discharges. The Board adopted the findings of the judge who stated:

> Respondent should not be permitted to rely upon its own unlawful conduct to defeat reinstatement merely because the discharged employees sought—albeit not successfully—to earn a livelihood after they were discriminatorily discharged. Not only were they free to utilize the talents they possessed in the field of their greatest experience, but the law required them to do so in order to minimize, to the fullest extent possible, Respondent's backpay liability.

Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Catalanello and Matthews because of their union activities. We shall order that the Respondent reinstate these employees and make them whole for any loss of earnings and other benefits they suffered by virtue of the Respondent's discrimination against them.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5.

"5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Catalanello and Matthews on

or about October 27, 1996, and by discharging employee Christine Holloway on or about October 29, 1996."

ORDER

The National Labor Relations Board orders that the Respondent, World SS, Inc., Pleasant Prairie, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activity or union support.

(b) Threatening employees that they could leave their jobs if they were unhappy and wanted union representation.

(c) Implying to employees that it would be futile to attempt to organize a union and that it would be futile to attempt to obtain a fair Board-run election.

(d) Suspending employees because they engaged in protected concerted activity.

(e) Discharging employees because of their membership in and/or support of Teamsters, Local 43, or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees John Catalanello, Christine Holloway, and Floyd Matthews full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Catalanello, Christine Holloway, and Floyd Matthews whole for any loss of earnings and other benefits they suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of employee Christine Holloway, and the unlawful suspension and discharges of employees John Catalanello and Floyd Matthews and, within 3 days thereafter, notify the employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 30, post at its various facilities copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union activity or union support.

WE WILL NOT threaten our employees that they could leave their jobs if they were unhappy and wanted union representation.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT imply to our employees that it would be futile to attempt to organize a union and that it would be futile to attempt to obtain a fair Board-run election.

WE WILL NOT suspend our employees because they engaged in protected concerted activity.

WE WILL NOT discharge our employees because of their membership in and/or support of Teamsters, Local 43, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer John Catalanello, Christine Holloway, and Floyd Matthews full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Catalanello, Christine Holloway, and Floyd Matthews whole for any loss of earnings and other benefits they suffered as a result of discrimination against them in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of employee Christine Holloway, and the unlawful suspensions and discharges of employees John Catalanello and Floyd Matthews, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

WORLD SS, INC.

Rocky L. Coe, Esq. and *J. Edward Castillo, Esq*., for the General Counsel.

Raymond Causey, Esq., of Pasadena, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on December 2–3, 1997. The charge in Case 30–CA–13549 was filed on October 23, 1996. The charge in Case 30–CA–13622 was filed on December 11, 1996. An order consolidating cases, amended consolidated complaint, and notice of hearing issued on July 18, 1997. The amended consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act by informing employees on October 8 that their organizing efforts were futile; by interrogating and threatening an employee on October 10 with unspecified reprisals, if he did not abandon his union activities; and by informing an employee on October 22, 1996, that the employees would not receive a fair election nor could the Union ultimately prevail in a Board-run election. It further alleges that the Respondent violated Section 8(a)(1) of the Act on October 26 by suspending employees John Catalanello and Floyd Matthews and by terminating their employment on October 27, 1996, because they engaged in union and protected concerted activities. Lastly, the amended consolidated complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act on October 22 by attempting to constructively discharge employee Christine Holloway, and by terminating her on October 29, 1996, because she engaged in union and protected concerted activities.

The Respondent's answer denied the material allegations of the amended consolidated complaint and also denied that the charges were properly served and that the Board has jurisdiction. In response, the General Counsel filed a motion to strike[1] those paragraphs of the answer denying proper service and jurisdiction. The General Counsel also moved to strike the Respondent's affirmative defenses.

With respect to the allegations concerning proper service and jurisdiction, the Respondent's counsel stipulated at the hearing that the charges were properly served and in a timely manner. He also stipulated that the Respondent maintains an office trailer at the SuperValu, Inc. warehouse in Pleasant Prairie, Wisconsin, and that between September 1 and December 31, 1996, the Respondent derived gross revenues in the amount of $59,689.34 from providing lumping services at that facility. Respondent's counsel also stipulated that between January 1 and November 7, 1997, the Respondent derived gross revenues in the amount of $212,406.05 from providing these same services at the same location. Finally, the Respondent's counsel stipulated that these revenues were derived from unloading products that were transported across State lines by truck. Accordingly, I grant the motion to strike the Respondent's answers to paragraphs 1 and 2(a), (b), and (c).[2] The allegations in the amended consolidated complaint concerning proper service and jurisdiction are deemed admitted.

The Respondent also denied that the Union was a labor organization within the meaning of the Act as alleged in paragraph 3 of the amended consolidated complaint. However, it offered no reasonable explanation for doing so nor any evidence to support its position. The Respondent's counsel conceded that he did not make a reasonable effort to ascertain whether the allegations of the complaint were true. Accordingly, I granted the motion to strike the answer to paragraph 3 of the complaint. The allegation in the amended consolidated complaint is deemed admitted.

Respondent's affirmative defenses 1–2, 4–6 assert that the Board unreasonably delayed processing the charges and that the complaint is time barred by Section 10(b) of the Act. The Respondent has not argued nor shown that its affirmative defenses have any merit. Nor does the evidence support affirmative defense 3, which asserts that paragraphs 9 and 10 of the complaint do not state facts sufficient to constitute a violation of the Act. Accordingly, the Respondent's affirmative defenses 1–6 are stricken.

[1] Sec. 102.21 of the Board's Rules and Regulations.

[2] The Respondent was granted leave to address the jurisdictional question in its posthearing brief, but failed to do so. Based on the evidence in the record, I therefore reconsider my prior ruling regarding par. 2(c) of the answer and grant the motion to strike that paragraph.

In the course of the hearing, the parties were afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and afterwards to file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, World SS, Inc., is a Texas corporation engaged in the business of providing lumping services at a distribution center owned and operated by SuperValu Inc. in Pleasant Prairie, Wisconsin. The evidence discloses that between the period of September 1, 1996, to November 7, 1997, the Respondent derived gross revenues from its lumping services at Pleasant Prairie, Wisconsin, in excess of $250,000 by unloading products that were transported from points outside the State of Wisconsin and delivered to SuperValu by truck. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

SuperValu Inc. operates a food distribution center (i.e., warehouse) in Pleasant Prairie, Wisconsin, where it receives products delivered by truck from outside vendors. Prior to August 1996, it engaged independent contractors called "lumpers" to unload the products from the trucks. The truckdrivers paid the lumpers a fee that was negotiated by the truckdriver and individual lumper. SuperValu therefore did not incur any expense for unloading the trucks.

In late August-early September 1996, Respondent World SS Inc. (World or WSS) contracted with SuperValu to provide lumping services at the Pleasant Prairie facility using lumpers employed by World. The truckdrivers paid World a fee, negotiated by World's dock supervisor and the truckdriver, for unloading the products.

In an effort to adequately staff the Pleasant Prairie facility, and with the hope of becoming the exclusive provider of lumping services at that location, World sought to employ the best qualified independent contractor lumpers, who were working at Pleasant Prairie. It also advertised for lumpers in local newspapers.[4] The newly hired lumpers were paid a salary of $400 per week, which was approximately half of what the independent contractors earned. World's lumpers also were not paid overtime for working more than 8 hours a day or 40 hours a week.

1. The attempt to organize the Pleasant Prairie facility

John Catalanello and Floyd Matthews were independent contractor lumpers, who had worked for several years at the Pleasant Prairie facility. On or about September 22, 1996, they were interviewed, hired, and began working for World. From the outset, Catalanello and Matthews were unhappy with their new employment arrangement. They were earning about half of what they had earned while working as independent contractors, they were not receiving overtime pay, and they were concerned about job security. After 1 day on the job, Catalanello, Matthews, and three other former independent contractor lumpers went to the Teamsters Local 43 union hall and signed authorization cards.

On October 7, Ray DeHahn, secretary-treasurer of Teamsters, Local 43, visited the SuperValu distribution center. He introduced himself to Arthur Harding, World's dock supervisor, and presented to him the signed authorization cards. DeHahn asked Harding if the Respondent would voluntarily recognize the Union. Harding examined the cards, but told DeHahn that he did not have the authority to recognize the Union. After DeHahn left, Harding notified his supervisor, Jeffrey Jones, the Respondent's branch manager at the Pleasant Prairie facility, that he had been approached by a union official seeking to recognize the lumpers. Jones called Assistant District Manager Zachary Price and District Manager Patrick Beck to tell them what occurred.[5]

2. Questioning Catalanello and Matthews about their union activities

The next morning, October 8, 1996, Catalanello and Matthews entered the World office trailer before going home at which time Branch Manager Jones began to question them about their decision to seek union representation. According to Matthews' uncontroverted testimony, Jones asked them: "What's the matter with you guys? Why aren't—we give you everything. Why aren't you happy? What do you want? Trying to Union—what do you want the Union for?" (Tr. 221.) Catalanello responded by telling Jones that they were concerned about their jobs and the conversation ended.

As Matthews and Catalanello left the trailer, they were joined by Harding, who occasionally rode to and from work with them. On the way home, the three men decided to stop for breakfast. Catalanello and Matthews testified that on route to the restaurant Harding stated, "So you guys want to turn union, huh?" (Tr. 84, 219.) Matthews and Catalanello responded affirmatively and nothing more was said.

At the restaurant, however, Harding again brought up the issue of the organizing campaign. He told them that "this company will never turn union." (Tr. 84.) Harding stated that it was not in World's best interest to have its lumpers unionize because if SuperValu's unionized employees[6] ever went on strike, World had the capability to operate the entire Pleasant Prairie facility. If World's lumpers were organized, the Union

[3] I also take judicial notice of *World SS, Inc.*, 310 NLRB No. 194 (1993) (not reported in Board volumes), where the Board asserted jurisdiction over the Respondent.

[4] World also brought in small crews of lumpers, who it employed at warehouses in other parts of the country. World provided these individuals with transportation to and from Pleasant Prairie, Wisconsin, hotel accommodations, and a meal stipend.

[5] A few days later, DeHahn received a letter, dated October 9, from Tim Athey, World's executive vice president, declining recognition.

[6] Teamsters, Local 43 also represented SuperValu's warehouse employees.

would prohibit the lumpers from crossing a picket line and thus deprive World of a potentially big business opportunity. When Matthews told Harding "that's pretty chicken shit," Harding replied, "If you don't like it you can leave." (Tr. 220.)

Two days later, October 10, as Catalanello was preparing to go home, Jones handed him a piece of paper with a name and telephone number on it. He told Catalanello that a man named Tim Athey wanted to speak with him. Catalanello took the paper and left without asking any questions. When he arrived home, he called the phone number and left a message on an answering machine. Athey called back later that day and identified himself as part owner of World SS, Inc. He asked Catalanello about his union activities and warned him that it would not be in his best interest to continue with the organizing drive.

3. The suspension of Catalanello and Matthews

On or about October 24, Harding asked Catalanello to unload another truck before going home. Catalanello agreed and asked Matthews to help. Matthews, however, was reluctant to start unloading another truck. It was close to the end of their regular shift and the SuperValu forklift drivers were about to take their lunchbreak, which normally meant that none of the Respondent's lumpers were allowed on the dock to unload. Matthews already had told Harding that he did not plan to stay late and knew that they would have to work well beyond the end of their regular shift.

In an effort to facilitate the unloading, Harding had made arrangements with a SuperValu supervisor to have a forklift driver pull the grocery pallets off the truck just before the SuperValu lunchbreak, so that the lumpers could remain on the dock to unload the pallet during the lunchbreak. Unfortunately, the forklift driver did not pull the pallets as planned, which meant that the truck could not be unloaded. When Harding noticed that nothing was getting done, he demanded in a loud voice to know the name of the forklift driver. Catalanello was reluctant to say anything for fear that the forklift driver might retaliate by refusing to pull the load. The forklift driver, however, overheard Harding. He dropped the pallet he was pulling and left to unload another truck.

At that point, Catalanello and Matthews became upset with Harding for delaying the job further by angering the forklift operator. By now, it was past the end of their regular shift and they had not even begun unloading a truck that would take at least 4 hours under normal conditions. Thus, they told Harding that they were going home to which Harding responded, "Fine, whatever."

When they returned to work that night, Jones asked them what had happened that morning. He said that he had received a phone call from his boss complaining about a truck that was left unloaded and someone was going to have to be held accountable. Matthews tried to explain that he and Catalanello had told Harding they were leaving several times, but Jones told them he would have to talk to Harding again, since their version of the story differed from Harding's.[7]

The following day Catalanello and Matthews were off from work. When they went to pick up their paychecks 2 days later, Jones told them they both were suspended for 3 days for walking off an uncompleted job, without permission. Matthews reacted by calling Harding, who was also present, a "lying son of a bitch" and accused him of trying to make them the scapegoats for his own mistakes. When Jones asked them to sign their suspension notices, they refused and walked out the room.

4. The discharge of Catalanello and Matthews

The next day—the first day of his suspension—Catalanello received a phone call from a truckdriver heading for the SuperValu distribution center, who needed help unloading his truck. The truckdriver apparently was unaware that World had taken over the lumping service. Catalanello arranged for him and Matthews to unload the truck. They met the driver at the guard shack and rode into the facility with him. In the course of unloading, they were approached by Jones, who asked if they were working as independent contractors. When they replied, "yes," Jones told them that they were competing directly with the Respondent and asked for their World SS, Inc. identification badges, effectively terminating their employment. Neither Catalanello or Matthews would return their badge until they received final paychecks. After being discharged, they continued to unload trucks as independent contractors until November 8, at which time SuperValu made World the exclusive provider of lumping services and posted a notice forbidding independent contractor lumpers.

5. The events involving Christine Holloway

In late September 1996, Christine Holloway responded to a newspaper ad for lumpers and was hired by World. She had never worked as an independent contractor and therefore had no prior lumping experience. Holloway became friendly with Catalanello and Matthews, who persuaded her to support the Union. She signed an authorization card the day after she began work, and frequently discussed the Union with them during lunch and breaks.

In October, Holloway missed a few days of work because of the flu. When she returned to work on October 22, she noticed that some of the lumpers who had worked with her were absent. When she asked Jones where everyone was, he told her that he had brought in lumpers from other World facilities to replace the lumpers who quit. Holloway testified that Jones also stated that he had brought in the outside lumpers to "beat us out of our union." (Tr. 175.) According to Holloway, she questioned Jones about the appropriateness of bringing in outside lumpers in order to defeat the Union[8] and told him it was unfair and wrong. When Holloway told Jones that she thought only permanent employees would be allowed to vote in a union elec-

[7] In the course of the hearing, the Respondent's counsel sought to introduce an unsigned, undated, handwritten document that Harding allegedly prepared and gave to Jones which purportedly contained Harding's account of the events leading up the suspension of Catalanello and Matthews. The document was not admitted on the grounds that it had not been properly authenticated and a proper basis was not established for admitting it under the "business record" exception to the hearsay rule. Respondent's counsel request for reconsideration of my ruling at p. 27, fn. 2 of his brief is denied for the same reasons the document was not admitted in the first place.

[8] Among the outside lumpers brought in by Jones were Jasper Wooten, Jay Wooten, Roderie Harvey, and Dexter Parker, who had been working for World at a distribution center in Landover, Maryland.

tion, Jones replied that he had his way of getting around these kinds of things. Holloway left the office trailer and went to the lunchroom.

A few minutes after Holloway entered the lunchroom, Harding walked in with three outside lumpers employed by World from Landover, Maryland. One of them, Jasper Wooten, introduced himself to Holloway and began making sexually offensive remarks to her. He boasted of his sexual prowess, and of his affair with Harding's former girlfriend. He crudely asserted that Holloway got her job as a lumper by having sexual relations with Jones and Harding. Although Holloway attempted to ignore him, Wooten made sexually offensive gestures and insisted that Holloway was going home with him that night and that her husband was not man enough to stop him. As Holloway looked toward Art Harding for assistance, he smirked and laughed, but did nothing to curtail the inappropriate behavior. Finally, Harding, Wooten, and the others were called back to work and left the lunchroom. Visibly shaken, two SuperValu employees tried to console Holloway, but she was too upset to finish her shift and went home.

Later that evening, Holloway called the World's office trailer and left a message on the answering machine. She explained that she had been sexually harassed by Jasper Wooten, and that she was afraid to return to work. She also asked what disciplinary action was being taken against Jasper Wooten. World management did not respond to Holloway's call either that night or the next day. Hearing no response from Jones or anyone else, Holloway called again the next day and left another message. Over the next 4 days, she proceeded to leave answering machine messages at the Pleasant Prairie office trailer and at the apartment shared by Jones and Harding.

Finally, on October 27, Jones answered the office trailer phone and spoke to Holloway. As she tried to explain her encounter with Jasper Wooten, Jones repeatedly interrupted her, stating that Harding had told him about her "conversation" with Jasper Wooten. (Tr. 185–186.) Jones told Holloway that there was a problem with her being out sick with the flu. When Holloway asked, "[W]hat am I fired?" (Tr. 186.) Jones at first denied she was being let go, but then told her she was fired.

III. ANALYSIS AND FINDINGS

A. The 8(a)(1) Violations

Paragraph 1 of the amended consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act on October 6, 1996, when Dock Supervisor Art Harding told Catalanello and Matthews that the Respondent would not go union and when he otherwise implied that it would be futile to attempt to organize a union. The Respondent denies that Harding was supervisor within the meaning of the Act. Thus, the threshold issue is whether Harding was a Section 2(11) supervisor.[9]

1. Harding's supervisory status

Section 2(11) of the Act defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is settled law that the enumerated criteria are to be read disjunctively. *Florence Printing Co.,* 145 NLRB 141, 144 (1994). The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee provided that the authority is exercised with independent judgment on behalf of management and not in a routine manner. *J. C. Brock Corp.,* 314 NLRB 157, 158 (1994). The burden of proving supervisory status rests on the party that makes the assertion. *Browne of Houston,* 280 NLRB 1222 (1986).

The credible evidence shows that Art Harding was responsible for directing the lumpers in their work assignments. He negotiated unloading fees with truckdrivers, assigned the lumpers to particular trucks, made sure that the lumpers completed their work in a timely manner, collected the fees, and wrote receipts.[10] He carried out these tasks without conferring or obtaining the approval of his supervisor and without any express instructions regarding how and when to carry out these duties. If extra help was required to finish unloading a truck, he could, and often did, ask lumpers to work beyond the end of their normal shift. The evidence further establishes that if the lumpers wanted time off or could not work because of illness, they would obtain permission to be off work from Harding. Thus, the evidence supports a reasonable inference that Harding used independent judgment in performing his daily supervisory tasks.

The evidence also shows that Harding worked the same hours as the lumpers, 8:45 p.m. to 4:45 a.m., which made him the primary World SS supervisor on the dock for a majority of the shift. The Respondent's branch manager, Jeff Jones, spent most of his worktime in the office trailer, and worked the 3 p.m. to 1 a.m. shift. The evidence therefore reflects that Harding usually was the only World SS supervisor at the facility between 1 and 4 a.m., which means that if he was not a supervisor within the meaning of the Act, the lumpers were unsupervised for almost 4 hours a night. See *Thurston Motor Lines,* 258 NLRB 385, 386 fn. 4 (1981).

The Respondent nevertheless asserts that the lumpers did not need supervision because they had worked as independent contractor lumpers before working for World SS and therefore they knew how to do their jobs. The argument ignores the fact that not all the lumpers had previously worked as independent contractors (e.g., Holloway) and that they all were working for a new company under a new system. As such, it was necessary for Harding to tell the lumpers what trucks to unload and when to unload them.

The Respondent also argues that Harding was not perceived as a supervisor by the employees because Catalanello and Matthews

[9] According to Respondent's counsel, Harding no longer worked for Respondent at the time of the hearing.

[10] The evidence discloses that at the end of the shift Harding was responsible for completing a section report showing which loads were completed, the method of payment, how much money had been collected, and how it was to be divided between the Respondent and the employees.

called him a "lying son of bitch" in the presence of Branch Manager Jeff Jones and because Jasper Wooten had openly bragged in Harding's presence about how he had championed Harding's girl friend. According to the Respondent, none of these employees would have conducted themselves in this manner if they truly believed that Harding was vested with supervisory authority. Legions of cases exist in which employees have cursed, threatened, and even attacked supervisors, notwithstanding their supervisory status under the Act. The comments directed at Harding do not detract from the fact that he assigned and directed the lumpers' work using independent judgment.

Accordingly, I find that Art Harding is a supervisor within the meaning of Section 2(11) of the Act.

2. The unlawful implication that the employees' unionizing efforts were futile

Paragraph 5 of the complaint alleges that during a car ride home on October 8, 1996, Harding told Catalanello and Matthews that he "guaranteed that the Respondent would not go union." The unrebutted evidence establishes that while driving to breakfast with Matthews and Catalanello that morning Harding stated in a nonconfrontational tone: "So you guys want us to turn union, huh?" (Tr. 83.) Matthews testified that after he responded, "Yes," Harding dropped the subject. Thus, the question as presented was more rhetorical than probing especially since Harding already knew that Matthews and Catalanello had signed union cards. I find therefore that the inquiry was noncoercive. *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985).

Later at breakfast, however, Harding reinitiated the conversation by telling Catalanello and Matthews that "[T]his company will never turn union." He also told them why World wanted to remain nonunion. According to Matthews, when he told Harding point blank "that's pretty chicken shit," Harding replied, "If you don't like it you can leave." (Tr. 220.)[11]

I credit Catalanello and Matthews' unrebutted account of the conversation at the diner.[12] The tone and intensity of this conversation, as gleaned from the witnesses' testimony, was confrontational, coercive, and threatening. The implication of Harding's comments was that it was futile to attempt to organize a union at the Pleasant Prairie facility and therefore his comments violate Section 8(a)(1) of the Act. I further find Harding's statement to Matthews that if he was unhappy he could leave constitutes an unlawful threat, which also violates Section 8(a)(1) of the Act. *Tualatin Electric*, 312 NLRB 129, 134 (1993).[13]

[11] Matthews testified that the conversation took place in the car on the way to the diner, but was not asked if the issue came up at the diner. To the extent that his testimony in this respect conflicts with Catalanello, the conflict is inconsequential and I credit Catalanello's recollection.

[12] The Respondent asserts that prior to the hearing Harding was terminated for embezzlement and therefore was not called as a witness.

[13] Although not specifically alleged in the amended consolidated complaint, I find that the statement is closely related to the allegation pled and was fully litigated.

3. The unlawful interrogation of Matthews and Catalanello by Jeff Jones

In his brief, counsel for the General Counsel asserts that the Respondent's branch manager, Jeff Jones, violated Section 8(a)(1) of the Act on October 8 by unlawfully interrogating Catalanello and Matthews shortly before they drove to breakfast with Harding. The credible evidence shows that on October 8 Jones asked Matthews and Catalanello, "What's the matter with you guys? Why aren't—we give you everything. Why aren't you happy? What do you want? Trying to union—what do you want the union for?" (Tr. 221.) According to Matthews, Catalanello responded that they sought union representation because they were concerned about their jobs.

Even though the allegation was not asserted in the amended consolidated complaint, it is appropriately before me for decision because it is closely related to the subject matter of the complaint and has been fully litigated. *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The amended complaint specifically alleges that the Respondent's executive vice president, Tim Athey, unlawfully interrogated Catalanello, and that Harding unlawfully implied that it would be futile to attempt to organize a union. A close connection therefore exists between the subject matter of the amended complaint and the additional allegation that Jones interrogated Catalanello and Matthews. In addition, the Respondent did not object to the testimony of Matthews about this conduct and did not object when its own witness, Jeff Jones, was cross-examined about the conversation. I therefore find that the issue was fully litigated.

Turning to the merits, I find that Jones' questioning of Matthews and Catalanello, reasonably tended to restrain, coerce, and interfere with their right to organize. The questions were unprompted and were initiated by a midlevel manager in the confines of his office trailer less than 24 hours after Union Official Ray DeHahn presented five authorization cards and demanded voluntary recognition. While not explicitly threatening, the manner in which the question was phrased, "What's the matter with you guys?" implies that in management's eyes Matthews and Catalanello had acted improperly in attempting to organize a union. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on October 8, 1996, when Branch Manager Jeff Jones interrogated Catalanello and Matthews about why they sought to organize a union.

4. The unlawful interrogation of Catalanello by Tim Athey

Paragraph 6 of the amended consolidated complaint alleges that on October 10, 1996, the Respondent's executive vice president, Tim Athey, unlawfully interrogated Catalanello by phone about his union support and unlawfully threatened that there would be negative consequences if he did not abandon his union organizing effort. Catalanello was a credible witness. In addition, his testimony on this issue was unrebutted. According to the Respondent's counsel, Athey was not called to testify because he too is no longer employed by the Respondent. Notably, Jeff Jones, who did testify for the Respondent, did not contradict or dispute Catalanello's assertions that Jones gave him Athey's phone number and told him to call. The evidence

shows that as a result, Catalanello called Athey, left a message on his answering machine, and Athey called back to question and threaten him. I credit Catalanello's testimony concerning his phone conversation with Tim Athey.

Thus, the evidence establishes that Catalanello was called at home by Athey, a high ranking management official of the Respondent, who after identifying himself as a part owner of World, proceeded to question Catalanello about his involvement with the Union and warned him that his best interests would not be served if he continued to support the Union. I find that Athey's conduct was coercive and that it restrained and interfered with Catalanello's Section 7 rights. Accordingly, I find that the Respondent violated Section 8(a)(1) when Executive Vice President Tim Athey phoned, questioned, and threatened Catalanello at his home on October 10, 1996.

5. The unlawful implication that it would be futile to expect a fair electionor union victory in a Board-conducted election.

In paragraph 7 of the amended consolidated complaint, it is alleged that on October 22, 1996, Branch Manager Jeff Jones told Holloway that the Respondent had brought in World SS employees from another facility to defeat the union organizing drive. At the hearing, Jones did not deny the remarks attributed to him by Holloway or rebut her testimony. For these, and demeanor reasons, I credit her testimony.

The evidence does not establish that the outside lumpers actually were brought in to defeat the Union. Whether or not that is true is immaterial. The real question is whether Jones' statements could have reasonably caused an employee to believe that it was futile to obtain a fair election. The unmistakably implication of his remarks is that the Respondent was capable of thwarting the Union's organizing efforts, even if it had to undermine the fairness of a Board-conducted election. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on October 22, 1996, when Branch Manager Jeff Jones told Holloway that he had brought in lumpers to defeat the Union.

6. The suspension of Catalanello and Matthews

a. The protected concerted activity

Paragraph 13 of the amended consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act on October 26, 1996, by suspending Catalanello and Matthews because they engaged in protected concerted activity by complaining about having to work extra hours without overtime pay and by leaving work in protest after completing their regular 8-hour shift.

The evidence establishes that lumpers were not paid overtime for working more than 8 hours a day.[14] Catalanello testified that by the end of their regular 8-hour shift he and Matthews had not even started unpacking the extra truck that Harding had asked them to unload, because the SuperValu forklift driver had not offloaded the pallets. Since they were not going to be paid overtime for working more than 8 hours, there was no incentive for them to stay. Matthews testified that the extra truck would take 4 hours to unload if everything went right and that he had told Harding several times earlier that evening that he was not working beyond his regular 8-hour shift. He was particularly upset about the Respondent's failure to pay overtime and had openly criticized World SS for its pay practices. According to Matthews, the Respondent's pay practice was one of the reasons he and Catalanello wanted to organize a union. Jones testified that he was aware that Matthews had openly criticized World SS and that he was unhappy with his pay.

Thus, the evidence supports a reasonable inference that the decision to leave work at the end of their 8-hour shift was a logical outgrowth of a concern expressed by Matthews and shared by Catalanello about the Respondent's failure to pay lumpers an overtime rate for work performed beyond 8 hours a day. The fact that they were suspended at the same time for the same reason, and the fact that they walked out of the suspension meeting together after refusing to sign their suspension notices, also supports the inference that they were engaged in protected concerted activity. *Mike Yurosek & Son, Inc.,* 310 NLRB 831 (1993).

The Respondent, however, argues unpersuasively that the walkout was not protected concerted activity because it did not involve a "labor dispute," which presented an articulated goal to which the employer could respond. (citing *Vemco, Inc. v. NLRB,* 79 F.3d 526 (6th Cir. 1996)). Section 2(9) of the Act broadly defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment." Working beyond 8 hours a day without receiving overtime pay is a term of employment which falls within the definition of the Act. In addition, the Respondent was aware that Matthews and Catalanello were concerned about overtime pay because Jones testified that Harding had previously told him that Matthews was openly criticizing the Respondent's pay practices. Thus, the Respondent could have addressed the issue prior to October 23.

I find that Catalanello and Matthews were engaged in protected concerted activity when they left work on October 23. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by suspending Catalanello and Matthews for 3 days.

b. The alleged unlawful union activity

Although there is no 8(a)(3) violation alleged in the amended consolidated complaint in connection with the suspensions, counsel for the General Counsel argues in his brief at pages 25–28 that the Respondent's conduct in suspending Catalanello and Matthews also violates Section 8(a)(3) of the Act.[15]

The evidence demonstrates that Catalanello and Matthews were engaged in protected activity, which was known to their supervisors, and opposed by the Respondent. The timing of the

[14] Nor is there any evidence that the lumpers were paid overtime for working more than 40 hours per week.

[15] In pars. 13 and 14 of the amended consolidated complaint, it appears that counsel for the General Counsel inadvertently omitted an allegation that the Respondent violated Sec. 8(a)(3) by suspending and terminating Catalanello and Matthews. Respondent's counsel does not address the oversight in his brief or anywhere else, but instead argues that the Respondent's conduct did not violate Sec. 8(a)(3) of the Act. Based on the evidence and the argument of both counsels, I find that the intent was to encompass such an allegation within the content of the amended consolidated complaint and that the issue has been fully litigated. I therefore shall decide the alleged violation of Sec. 8(a)(3) as well.

suspensions tends to support a reasonable inference that their protected union activity was a motivating factor in the decisions to suspend. Sufficient evidence therefore exists to find that the General Counsel has satisfied his initial evidentiary burden. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Respondent asserts, however, that Catalanello and Matthews were suspended for leaving work without permission and before completing a job. Jones testified that he, not Harding, made the decision to suspend and that his decision was based on Harding's version of what occurred. The General Counsel does not dispute this testimony. Catalanello and Matthews testified that Harding lied to Jones about what actually occurred in order to protect himself. According to them, he made a bad situation worse by overreacting when the SuperValu forklift driver failed to unload the pallets. He was also untruthful when he told Jones that they did not tell him they were going to leave work. But even if Harding lied to Jones, which the evidence suggests he did, the evidence does not establish that he was motivated to lie because of Catalanello's and Matthews' protected activity. Rather, the evidence discloses that he lied to protect his own job. Also, there is no evidence that Jones chose to believe Harding's version of what transpired, instead of Catalanello and Matthews' version, because of their protected union activity. I therefore find that under the circumstances the Respondent would have suspended Catalanello and Matthews regardless of their union activity. Accordingly, Section 8(a)(3) of the Act was not violated.

7. The discharges of Catalanello and Matthews

a. Alleged protected concerted activity

According to paragraph 13 of the amended consolidated complaint, the Respondent violated Section 8(a)(1) of the Act by discharging Catalanello and Matthews on October 27 because they had engaged in protected concerted activity (i.e., complained about the Respondent's pay practices and left work on October 24 after completing their regular 8-hour shift). In *Meyers Industries,* 281 NLRB 882, 885 (1986), the Board stated that to find an employee's activity to be protected concerted, the activity must be engaged "in and with or on the authority of other employees, and not solely by and on behalf of the employee himself." The evidence shows that while suspended Catalanello and Matthews were engaged in providing lumping services as individual independent contractors, not employees. At the time they were discharged, they were not attempting to address or advance a term or condition of employment affecting the lumpers employed by Respondent. Rather, the evidence discloses that they undertook to lump in order to provide for themselves and their families. Thus, they were not acting to improve their lot as employees, but rather as individual independent contractors. Cf., *Harrah's Lake Tahoe Resort,* 307 NLRB 182, 187 (1992). I find that, contrary to the General Counsel's allegations, Catalanello and Matthews were not engaged in protected concerted activity at the time of their discharge, nor is there evidence linking the discharges to the protected concerted activity surrounding their suspensions. Accordingly, I shall recommend that the allegations of paragraph 13 of the amended consolidated complaint be dismissed.

b. Alleged protected union activity

While not alleged in the amended consolidated complaint, the General Counsel argues in his brief at pages 30–32 that the discharges also violated Section 8(a)(3) of the Act. The evidence demonstrates that after Catalanello and Matthews initiated the Union's organizing drive Harding was handed five signed authorization cards by the union secretary-treasurer, DeHahn, including two cards signed by Catalanello and Matthews. The very next day, Branch Manager Jeff Jones questioned them about why they wanted a union. A few hours later, Harding told them directly that the Respondent would never allow a union at the Pleasant Prairie facility. Later, on October 10, Catanellano received a call at home from the Respondent's executive vice president, who questioned him about his union activity and told him it would be in his best interest to stop supporting the Union. On October 26, Catalanello and Matthews received 3-day suspensions and on October 27 they were discharged. The timing of the discharge, along with the Respondent's unequivocal opposition to the Union, tends to support a reasonable inference that the protected union activity was a motivating factor in the decisions to discharge. I therefore find that the General Counsel has satisfied his initial evidentiary burden.

The Respondent argues that Catalanello and Matthews were discharged because they acted against the Respondent's economic interests by unloading trucks at the Pleasant Prairie facility as independent contractors while on suspension. The undisputed evidence shows that when confronted by Jones on the dock, Catalanello and Matthews acknowledged that they were working as independent contractor lumpers. According to Jones' unrebutted testimony, he explained to Catalanello that he was being terminated for working in direct competition with the Respondent. When Jones also asked them to return their World SS identification cards,[16] they refused to do so until they received their final paychecks. The implication is that they continued to use their World ID card in order to gain access to the facility to provide lumping services as independent contractors.

The Board has affirmed the dismissal of complaints where an employee has engaged in conduct detrimental to the employer's business interests. *Associated Advertising Specialists,* 232 NLRB 50, 54 (1977); *Crystal Linen Service,* 274 NLRB 946, 949 (1985), and cases cited therein. The evidence establishes that although they were suspended Catalanello and Matthews were still employed by Respondent, and that their conduct placed them in direct competition with their employer. The evidence establishes that World SS performed almost all the lumping services for SuperValu at the time of the discharges. Most of the independent contractor lumpers were gone and only one other lumping company, Birchwood Transportation Company, was on the premises. The evidence also shows that the Respondent was trying to obtain an exclusive contract with the SuperValu to perform all of its lumping work at the Pleasant Prairie facility, which it eventually was awarded 2 weeks after the discharges.

[16] The evidence shows that Matthews was wearing his World SS identification card in plain view when Jones approached him.

The evidence therefore supports a reasonable inference that the lumping services performed by Catalanello and Matthews would have been performed by the Respondent and that their conduct was detrimental to its business interests.[17] The Respondent has articulated a legitimate business reason for discharging Catalanello and Matthews. I find that the evidence supports a reasonable inference that they would have been discharged even in the absence of their union activity. Accordingly, I shall recommend that the allegations of paragraphs 12, 13, and 14, as related to paragraphs 11(c) and (d), and to the extent that they allege that the discharges violated Section 8(a)(3) of the Act, should be dismissed.

B. The Unlawful Discharge of Christine Holloway

1. The General Counsel's evidence

The General Counsel argues, and the amended consolidated complaint alleges, that the Respondent constructively discharged Christine Holloway in violation of Section 8(a)(3) of the Act by allowing coworkers to sexually harass her (which forced her to leave the jobsite), by refusing to allow her to return to work, and by eventually terminating her employment because she supported the Union and had engaged in protected union activity.

The evidence establishes that Holloway was a union supporter and that her union support was known to the Respondent. She signed a union authorization card and associated herself with Catalanello and Matthews with whom she frequently took breaks. The evidence also establishes that Jones was aware that Holloway supported the Union based on their discussion on October 22. When Jones told Holloway that he had recruited lumpers from other World SS facilities to defeat the Union, she told him bluntly that his conduct was unfair and also questioned whether it was legal. The undisputed evidence also shows that shortly thereafter, while in the lunchroom, Holloway was subjected to vulgar and sexually offensive language, as well as sexually offensive gestures by one of the lumpers, Jasper Wooten, who Jones had recruited from another World SS facility.[18] The evidence shows that Wooten solicited sex from Holloway, "humped the air," told her that her husband was no match for him, and boasted that he had championed Harding's girlfriend.

Holloway credibly testified that she was so unsettled by Wooten's offensive language and conduct, and Harding's failure to take any action, that she immediately left work in fear of her life and was afraid to return without the Respondent's assurance that she would not be harassed again. The unrebutted evidence discloses that despite several phone messages left for Jones explaining why she was not at work and requesting that he call her, Jones never returned any of her phone calls. Holloway nevertheless continued calling Jones until she finally reached him on October 29, 1996, when he told her that she was terminated for missing too many workdays, including the 2 sick days, which she took for the flu.

The Respondent's failure to remedy Wooten's inappropriate conduct, Jones' failure to return Holloway's phone calls, and the reason Jones gave for her termination, despite her several phone messages explaining her absence, support a reasonable inference that the Respondent was glad to get rid of her because she supported the Union. I therefore find that the General Counsel has satisfied his initial evidentiary burden.

2. The Respondent's fabricated defense

The Respondent argues that Holloway abandoned her job without cause. It asserts that after its managers, Zack Price and Jeff Jones, were advised that Wooten sexually harassed Holloway, they spoke with her, told her to go back to work, and assured her they would take care of the matter. The Respondent asserts that later that night Assistant District Manager Zack Price terminated Jasper Wooten. It asserts that Holloway nevertheless left work before her shift ended, without permission, and without telling anyone. The Respondent contends that after failing to report for several days, she called in asking to return, but was told she was terminated for abandoning her job.

The Respondent's defense is based heavily on the testimony of Zack Price, which for demeanor, and other reasons, I find was unconvincing. Price testified that he and Jones met with Holloway shortly after she was sexually harassed to find out what happened and to assure her he would take care of everything. His testimony is contradicted by Holloway, who testified that she did not see or speak to Price on the evening in question nor did she see or speak to Jones that night after being harassed. Holloway was a very sincere and credible witness and I credit her testimony over Price and Jones.

Not only was Price's testimony contradicted by Holloway, it was not corroborated by Jones, who took the witness stand right after Price. Jones did not confirm that he and Price met with Holloway or that they met with Wooten and the other out-of-state lumpers who were present in the breakroom when Holloway was sexually harassed. He also did not confirm that Wooten was terminated. When a party calls as part of its case-in-chief a witness with particular knowledge of important facts, who does not testify as to those facts, an adverse inference is warranted that the witness' testimony would not have supported the party's position. *Woodland Health Center,* 325 NLRB 251, 255 (1998).

In addition, Price's testimony was misleading and internally contradictory. In an attempt to foster the impression that he acted quickly to address Wooten's appalling behavior, he testified that he terminated Wooten from that facility and recommended that he not be allowed to work for the Respondent at any other facility. The evidence shows, however, that Wooten was prescheduled to depart on the day after he sexually harassed Holloway as reflected by his airline ticket manifest (GC

[17] The General Counsel argues, in part, that the Respondent's reason for discharging Catalanello and Matthews is pretextual because in cross-examination Jones asserted that a prohibition against working as an independent contractor lumper could be inferred from a written rule that states: "All unloaders are to follow instructions from the supervisor on their dock." (G.C. Exh. 7.) While a plain reading of that rule does not support that assertion, it does not change the fact that while still employed by the Respondent the two lumpers engaged in direct competition with their employer, at a time when it was seeking the exclusive right to provide lumping services at the Pleasant Prairie facility, which constitutes a legitimate reason for discharge.

[18] Contrary to counsel for the General Counsel's assertions, the evidence does not establish that the outside lumpers were recruited or directed to sexually harass Holloway because of her union activity.

Exh. 8). It also shows that despite his representations to the contrary, Price did not enter Wooten as terminated in the computer. Rather, Wooten, and the other outside lumpers, simply returned to the Respondent's Landover, Maryland facility, where they continued to be employed. Notwithstanding this evidence, Price asserted again in cross-examination that he terminated these employees, only to contradict himself:

> Q .In fact Mr. Jasper Wooten was not fired at that time, isn't that correct?
>
> A. No, I terminated him at that time.
>
> Q. Mr. Jasper Wooten continued to work for World SS, is that not correct?
>
> A. That's correct.
>
> [Tr. 229.]

The argument that Holloway abandoned her job without cause is implausible for other reasons. First, Holloway's conduct reflects that she was interested and wanted to continue working as a lumper. According to her unrebutted testimony, she repeatedly left messages on Jones' answering machine explaining what happened and why she was not coming to work. Her perseverance in contacting Jones therefore does not paint an image of someone who abandoned her job. Next, the vulgarity of Wooten's conduct and language in the presence of her supervisor justified her reluctance to return to a sexually hostile work environment. Because Jones did not return her phone calls, she had no way of knowing what to expect if she returned.

Finally, the credible unrebutted testimony of Holloway establishes that the Respondent's reason for her termination changed. Holloway testified that when she finally reached Jones on the phone, he first told her that she was not terminated, but then informed her she was terminated because of absenteeism and alluded to the sick days that she took off. The Respondent now asserts that she was terminated for walking off the job without permission or explanation.

Under all of the circumstances, I find that the Respondent's proffered reason for termination is pretextual. The evidence supports a reasonable inference that by failing to take appropriate action, including returning Holloway's phone calls, the Respondent sought to use the sexual harassment as an opportunity to get rid of a union supporter. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by terminating Christine Holloway.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Arthur Harding is a supervisor within the meaning of Section 2(11) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening John Catalanello and Floyd Matthews on October 8, 1996, and implying that it was futile to organize a union at the Pleasant Prairie, Wisconsin facility.

(b) Interrogating John Catalanello and Floyd Matthews on October 8, 1996.

(c) Interrogating and threatening John Catalanello on October 10, 1996.

(d) Implying to Christine Holloway on October 22, 1996, that it would be futile to try to organize a union and obtain a fair Board-run election.

(e) Suspending John Catalanello and Floyd Matthews on or about October 26, 1996.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Christine Holloway on or about October 29, 1996.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully suspended John Catalanello and Floyd Matthews in violation of Section 8(a)(1) of the Act, it must make them whole for any loss of earnings and other benefits, that they may have suffered as a result of the unlawful conduct practiced against them, computed on a quarterly basis from the date of their suspensions to the date of their discharge, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent unlawfully discharged Christine Holloway, in violation of Section 8(a)(3) and (1) of the Act, it must offer her reinstatement; if necessary, terminating the service of employees hired in her stead, and make her whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination practiced against her, computed on a quarterly basis from the date of discharge to date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]